JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1057

CLIMAX CHEMICAL COMPANY, *Petitioner,*

v.

C. F. BRAUN & Co., a corporation;
PENNSALT CHEMICAL CORPORATION, a corporation;
J. T. THORPE, INC., a corporation;
HEYWARD-ROBINSON COMPANY, a partnership;
BERNARD GOODMAN and ALEXANDER SOMMER, partners composing said partnership;
THERMAL RESEARCH & ENGINEERING CORPORATION, a corporation;
STEPHENS-ADAMSON MFG. CO., a corporation;
STANDARD STEEL CORPORATION, a corporation; and
BEAUMONT BIRCH COMPANY, a corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

(See inside cover for counsel)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

J. R. Modrall
Daniel A. Sisk
Kenneth L. Harrigan
P. O. Box 466
Albuquerque, New Mexico
Attorneys for Respondent
C. F. Braun and Company

James C. Ritchie
Duane C. Gilkey
P. O. Box 1828
Albuquerque, New Mexico
Attorneys for Respondent
Pennsalt Chemical Corporation

John B. Tittman
Russell Moore
First National Bank Bldg., W.
Albuquerque, New Mexico
Attorneys for Respondents
J. T. Thorpe, Inc., and
Beaumont Birch Company

David G. Houseman
3624 Menaul Blvd. N. E.
Albuquerque, New Mexico
Attorney for Respondent
Heyward-Robinson Company

David A. Grammer
Bank of New Mexico Building
Albuquerque, New Mexico
Attorney for Respondent
Thermal Research and
Engineering Corporation

Richard B. Addis
P. O. Box 1457
Albuquerque, New Mexico
Attorney for Respondent
Stephens-Adamson Mfg. Co.

Willard F. Kitts
P. O. Box 487
Albuquerque, New Mexico
Attorney for Respondent
Standard Steel Corporation

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	4
I. The Decision on Separate and Independent Causes of Action in No Way Conflicts With the Prior Decision of the United States Supreme Court	4
II. The Decision Gives Full Effect to Section 1441(c) and in No Way Departs From the Tests Contemplated by the *Finn* Case	7
III. The Decision of the Court of Appeals in No Way Conflicts With Its Own Prior Decisions or With the Decisions of Other Courts of Appeals	8
IV. Construing 28 U.S.C., Section 1441(c) To Permit Removal of Separate and Independent Causes of Action in the Absence of Complete Diversity of Citizenship Is Clearly Constitutional	12
V. Whether the Removal Bond of a Single Defendant Can Effect Removal for Multiple Co-Defendants Is Not Such a Question as Should Be Decided by the United States Supreme Court and, Furthermore, the Decision Below on Such Point Was Entirely Correct	19
Conclusion	22

INDEX OF CITATIONS

Cases:	Page
Abel v. United States, 362 U.S. 217 (1960)	18
American Fire and Casualty Co. v. Finn, 341 U.S. 6 (1951)	4, 6, 7, 8, 14, 16, 17
Baltimore Gas & Electric Co. v. United States Fidelity & Guaranty Co., 159 F. Supp. 738 (D. Md. 1958)	14
Barney v. Latham, 103 U.S. 205 (1881)	15
Breslerman v. American Liberty Ins. Co., 169 F. Supp. 531 (E.D. N.Y. 1959)	14
Charles Dowd Box Co. v. Fireman's Fund Ins. Co., 303 F. 2d 57 (5th Cir. 1962)	10
Chase v. Erhardt, 195 F. 305 (Vt. 1912)	20, 21
CIT Corporation v. Ambrose, 36 F. Supp. 311 (E.D. S.C. 1940)	20, 21
Covington v. Indemnity Insurance Co., 251 F. 2d 930 (5th Cir. 1958)	22
Dennis v. Alachua County, 3 Woods 683, 7 Fed. Cas. p. 467, No. 3791 (C.C. Fla. 1877)	22
Donahue v. Warner Bros., 194 F. 2d 6 (10th Cir. 1952)	9
Duignan v. United States, 274 U.S. 195 (1927)	18
Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F. 2d 412 (8th Cir. 1958)	18
Fayette Title and Trust Company v. Maryland P. & W. V. T. T. Company, 180 F. 928 (C.C. Pa. 1910)	21
Federal Trade Commission v. Travelers Health Assn., 362 U.S. 293 (1960)	18
Finn v. American Fire and Casualty Co., 207 F. 2d 113 (5th Cir. 1953), cert. den. 347 U.S. 912 (1954)	17
Gaines v. Fuentes, 92 U.S. 10 (1875)	12
Gallahar v. Geo. A. Rheman Co., 50 F. Supp. 655 (S.D. Ga. 1943)	21
Greenshields v. Warren Pet. Corp., 248 F. 2d 61 (10th Cir. 1957), cert. den. 355 U.S. 909	5, 11, 12
Gray v. New Mexico Military Institute, 249 F. 2d 28 (10th Cir. 1957)	9
Gray v. Oregon Shortline R. Co., 37 F. 2d 591 (S.D. Idaho 1930)	21
Haynes v. Felder, 239 F. 2d 868 (5th Cir. 1957)	13
Herbert v. Roxana Petroleum Corporation, 12 F. 2d 81, (E.D. Ill. 1926)	21
Hodge v. Chicago & A. Ry. Co., 121 F. 48 (8th Cir. 1903)	21
Hunt v. Pearce, 284 F. 321 (8th Cir. 1922)	20

Page

James Rivers Apartments v. Federal Housing Administration, 136 F. Supp. 24 (Md. 1955) 22
Kithcart v. Metropolitan Life Ins. Co., 150 F. 2d 997 (8th Cir. 1945), cert. den. 326 U.S. 777 12
McLeod v. Cities Service Gas Co., 233 F. 2d 242 (10th Cir. 1952) 9
McMahan v. Fontenot, 212 F. Supp. 812 (W.D. Ark. 1963) 20
National Quicksilver Corp. v. World Insurance Co. of Omaha, 139 F. 2d 1 (8th Cir. 1943) 21
Nelson v. Peter Keiwitt Sons Co., 130 F. Supp. 59 (N.J. 1955) 20
Orn v. Universal Automobile Assn. of Indiana, 198 F. Supp. 377 (E.D. Wisc. 1961) 17
Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) 13
Peter Holding Co. v. LeRoy Foods, Inc., 107 F. Supp. 56 (N.J. 1952) 20
Phelps v. Oaks, 117 U.S. 236 (1886) 13
Public Grain and Stock Exchange v. Western Union Telegraph Company, 16 F. 289 (C.C. Ill. 1883) ... 21
Reynolds v. Bryant, 107 F. Supp. 704 (S.D. N.Y. 1952) 17
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 19
Scheideler v. Jones, 105 F. Supp. 726 (S.D. N.Y. 1952) 17
Shelley v. Kraemer, 334 U.S. 1 (1948) 18
Snow v. Powell, 189 F. 2d 172 (10th Cir. 1951) 8, 9, 16
Stangard Dickerson Corp. v. United Electric R & MW, 33 F. Supp. 449 (N.J. 1940) 20
Strawbridge v. Curtiss, 3 Cranch 267 (1806) 13
Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) 13
Texas Employer's Ins. Assn. v. Felt, 150 F. 2d 227 (5th Cir. 1945) 12, 17
Twentieth Century Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D. N.Y. 1965) 5, 13, 14
Tucker v. Kerner, 186 F. 2d 79 (7th Cir. 1950) 20, 22
Ulmann v. United States, 350 U.S. 422 (1956) 18
United States v. Johnston, 268 U.S. 220 (1925) 7
Wichita R.R. & Light Co. v. Public Utilities Comm., 260 U.S. 48 (1922) 13
Willoughby v. Sinclair Oil & Gas Co., 188 F. 2d 902 (10th Cir. 1951) 9

STATUTES: Page

Constitution of the United States—
Article I, Section 8, Clause 18 2
Article III, Section 2 .....13, 15, 16

Federal Interpleader Act, 28 U.S.C.—
Sections 1335, 1397, 2361 13
Section 1441(c) 7, 13, 14, 15, 16, 17, 18
Section 1446(d) 19, 20, 21

Judiciary Act of 1789 13

MISCELLANEOUS:

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Sections 2341-2346 and commentary at 119-159 (Tentative Draft No. 2, 1964) 13-14
144 A.L.R. 1266, 1267 21
76 C.J.S. Removal on Causes, § 204, page 1063 20
Federal Rules of Civil Procedure—
Rule 20 17
Rule 82 17
46 Iowa Law Review 489 (1961), Moore and Van Dercreek, "Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim under Section 1441(c)" 14
46 Minnesota Law Review 1 (1961), Cohen, "Problems in the Removal of a 'Separate and Independent Claim or Cause of Action'" 14
1A Moore's Federal Practice, 2d Ed.—
Section 0.163 (4.-5) at p. 708 17
Section 0.168 (3.-7), p. 1286 22
69 Supreme Court V, VI, address of former Chief Justice Vinson before American Bar Association, September 7, 1949 7
7 Vand. Law Review 472 (1954), Green, "Jurisdiction of the United States District Courts in Multiple Claim Cases" 14
49 Yale Law Journal 377 (1940), Chafee, "Federal Interpleader Since the Act of 1936" 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1057

CLIMAX CHEMICAL COMPANY, *Petitioner,*

v.

C. F. BRAUN & Co., a corporation;
PENNSALT CHEMICAL CORPORATION, a corporation;
J. T. THORPE, INC., a corporation;
HEYWARD-ROBINSON COMPANY, a partnership;
BERNARD GOODMAN and ALEXANDER SOMMER, partners composing said partnership;
THERMAL RESEARCH & ENGINEERING CORPORATION, a corporation;
STEPHENS-ADAMSON MFG. CO., a corporation;
STANDARD STEEL CORPORATION, a corporation; and
BEAUMONT BIRCH COMPANY, a corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the 10th Circuit and the dissenting opinion are copied in the petition as Appendix B and Appendix C, and are reported at 370 F. 2d 616.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(1) Whether a complaint which seeks to recover separate damages from numerous defendants for individual breaches of their separate contracts calling for different performances and which seeks to recover against one defendant for all the damages alleged to have resulted from the inoperable condition of plaintiff's manufacturing plant states separate and independent claims or causes of action within the meaning of Section 1441(c).

(2) Whether construction of Section 1441(c) to permit removal of an action in the absence of total diversity of citizenship violates the Constitution.

(3) Whether a removal bond executed by one defendant as principal is sufficient under Section 1446(d) when each of the other defendants filed joinders therein within the removal period and the surety subsequently ratified such bond.

STATUTES INVOLVED

In addition to those set forth in the petition at pp. 3-4:

Article I, Section 8, Clause 18 of the Constitution of the United States:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

STATEMENT

There are several portions of the petitioner's Statement of the Case which respondents submit are misleading or inaccurate or state conclusions which properly belong in the argument.

The complaint alleges that Braun guaranteed that the plant as designed would "handle and accommodate" certain materials (R. 7-8), not that the plant would "produce" specific quantities of the products. The reference to "a single injury" suffered by petitioner is not alleged anywhere in the complaint and is an attempt to determine the very issue which was decided adversely to petitioner by the Court of Appeals. The statement that one of the grounds for the Motion to Remand was that "there is a single cause of action and each respondent is jointly and severally liable thereon for a part of the total damages flowing from a single injury" is a misstatement of the language of the Motion to Remand (R. 35), is argumentative, and again merely recites petitioner's conclusion on the issue which was decided against petitioner by the Court below.

A more precise and succinct statement of the case than that contained in the petition is set forth in the first three paragraphs of the opinion of the Court of Appeals (Petition, App. B, pp. 6a-8a).

ARGUMENT

I.

THE DECISION ON SEPARATE AND INDEPENDENT CAUSES OF ACTION IN NO WAY CONFLICTS WITH THE PRIOR DECISION OF THE UNITED STATES SUPREME COURT.

Petitioner's argument that the decision conflicts with *American Fire and Casualty Co.* v. *Finn,* 341 U.S. 6 (1951), is based upon its misconstruction of the opinion below by Judge Aldrich.

The Court of Appeals devoted four paragraphs of its opinion to a discussion of the *Finn* case and to an application of its test for determining whether a separate and independent claim or cause of action exists. The "single wrong" test of *Finn* was clearly recognized by the Court below but after a thorough and succinct analysis of the true nature of petitioner's complaint it held that there was more than one primary right and more than a single wrong alleged. The principles laid down by the Supreme Court were not only recognized but were relied upon and carefully and correctly applied by the Court of Appeals in reaching its decision.

The assertion of alleged conflict is premised solely upon an attempted analogy between the facts of the *Finn* case and the facts alleged here. The Court of Appeals properly held that the facts of the two cases were readily distinguishable and that a different result must follow. The petitioner urges that simply because all of the units were to be installed in one plant and such plant would not function there was a single wrong and there could be no separate and independent causes of action. This was not what *Finn* meant by a single wrong.

Both Courts below recognized what petitioner consistently ignores, that the mere fact that Thermal's services and equipment were ultimately to be used at the same manufacturing plant as equipment of the other defendants does not turn different breaches of different contracts which call for totally different performances into a single wrong and does not change the separate and independent nature of the various claims. *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965); *Greenshields* v. *Warren Pet. Corp.,* 248 F. 2d 61 (10th Cir. 1957).

By pointing out that petitioner's manufacturing plant was composed of a number of separate units and that whether one or several units failed to function the plant could not operate, the Court of Appeals was not making a finding of fact as petitioner alleges, but rather was taking notice of a fact situation which is readily apparent from the allegations of petitioner's complaint and which emphasizes the fallacy of petitioner's argument that there was only a single injury. The complaint alleges, for example, that the salt evaporating unit and the sulfuric acid vaporization unit constructed by Thermal were "essential parts" of the manufacturing plant, but no allegation is made that any of the defendants other than Braun and Thermal had anything whatever to do with those units.

It would be difficult to imagine causes of action more separate and independent than a claim against one corporation for manufacturing an evaporating unit and a claim against another corporation for manufacturing and selling certain unrelated valves. The alleged liability of the two corporations is not contingent upon proof of the same facts, and their liability is separate,

distinct and unrelated, as one corporation could be held liable while the other was exonerated. And as the Court of Appeals recognized:

> "The only possible question is whether the addition of Braun as a party defendant changes the result. Broken down into its component parts, the complaint makes two kinds of claims against Braun. First, it is alleged to be jointly liable with each of the other defendants for defects in the performance by each defendant of its individual contract. Second, it is alleged to be solely liable for all damages stemming from the inoperable condition of the plant, due to its poor engineering and design, for which none of the other defendants is liable. It may be granted that this latter claim is a single cause of action. However, by its very nature it is separate and independent of the causes of action asserted against the other defendants. Its presence weakens, rather than strengthens, plaintiff's present position." (Petition, App. B, p. 10a)

The Court then concluded that the case involved a number of additional claims against Braun and the other defendants that are separate and independent from the claim against Thermal and the fact that they related to the same plant was not enough.

It is apparent from a reading of the petition and of the opinion below that this is a case turning solely upon its own special facts and is only of consequence to the immediate parties involved. This factual situation is not a recurring one and the decision has no real consequences for other litigants in other factual situations, because the single wrong test set forth by the Supreme Court in *Finn* remains the guideline for determining the existence of separate and independent causes of action. As former Chief Justice Vinson said

in his address before the American Bar Association on Sept. 7, 1949, 69 Supreme Court V, VI:

> "If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

There are no "special and important" reasons compelling the exercise of this Court's discretion when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. See *United States* v. *Johnston,* 268 U.S. 220 (1925).

II.

THE DECISION GIVES FULL EFFECT TO SECTION 1441(c), AND IN NO WAY DEPARTS FROM THE TESTS CONTEMPLATED BY THE FINN CASE.

Petitioner takes out of its context one sentence from the majority opinion and incorrectly concludes therefrom that the Court of Appeals gave no effect to the separate and independent requirement of Section 1441 (c) and has permitted removal on the basis of separable controversies. Such conclusion is not only totally erroneous but grossly unfair.

Petitioner ignores that the Court accurately quoted Section 1441(c) in footnote two of its opinion and referred to "separate and independent" claims or causes of action on six occasions and devoted four paragraphs to a discussion of the Supreme Court's construction of Section 1441(c) in *Finn.* The Court

below applied the *Finn* test to the facts involved and concluded that petitioner had failed to bring itself within the single wrong test therein enunciated. A detailed explanation was given of why the claims or cause of action against Braun and the other defendants are separate and independent from the claim or cause of action against Thermal and Braun.

Furthermore, "separability" is simply an adjective form of the verb "separate" and there is no substantial difference in the meaning of the two. The 1948 addition of the term "independent" added a more substantive disassociation between the claims than existed theretofore, because it not only required that the claims be distinct but that they be self-sustaining and not resting upon each other for support. *Snow* v. *Powell,* 189 F. 2d 172 (10th Cir. 1951).

Petitioner's implication that the Court of Appeals ignored the revisions made by Section 1441(c) more than eighteen years earlier is totally without merit.

III.

THE DECISION OF THE COURT OF APPEALS IN NO WAY CONFLICTS WITH ITS OWN PRIOR DECISIONS OR WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner's argument on this point only serves to emphasize why this Court should not grant certiorari. The substance of its argument is that the Court below erred in its judgment in that the particular facts alleged in this case cannot be distinguished in principle from the cases relied upon by the petitioner. This again reveals that the decision below turned solely upon an analysis of the peculiar facts of this case and that the decision will affect few other than the litigants in this lawsuit.

Judge Aldrich correctly stated that the cases relied upon by petitioner do not support its argument.

Willoughby v. *Sinclair Oil & Gas Co.*, 188 F. 2d 902 (10th Cir. 1951), was distinguished by the Court below on the ground that it involved only one wrong and the defendants were claimed to be jointly liable for *all* the damages, while here there was more than one wrong and the defendants were not alleged to be jointly liable for all of the damages. *Willoughby* was a wrongful death action brought because of the explosion of a hot water heater caused by the concurrent negligence of three defendants and its factual inapplicability to the instant case is readily apparent. *Snow* v. *Powell*, 189 F. 2d 172 (10th Cir. 1951) and *Donahue* v. *Warner Bros.*, 194 F. 2d 6 (10th Cir. 1952) were similarly distinguished. In *Snow* the plaintiff was struck by a hammer in a railroad depot and he sued his attacker and the railroad company to recover damages for what was obviously one wrong and one injury. In *Donahue* the only wrong alleged was the invasion of one person's right of privacy and all of the defendants were claimed to be jointly liable for all of the damage.

McLeod v. *Cities Service Gas Co.*, 233 F. 2d 242 (10th Cir. 1952), is readily distinguishable. Unlike the present situation, *McLeod* involved only one wrong stemming from the concurrence of separate acts of negligence and the defendants were alleged to be jointly liable for *all* the damage.

A single alternative recovery was sought against the school and its insurer in *Gray* v. *New Mexico Military Institute*, 249 F. 2d 28 (10th Cir. 1957), for a single bodily injury suffered by the plaintiff and the case thus bears no relation to the present case and in no way compels a different result.

Likewise, there is no conflict with *Charles Dowd Box Co.* v. *Fireman's Fund Ins. Co.*, 303 F. 2d 57 (5th Cir. 1962). The single wrong there alleged was the defendants' failure to pay compensation under their substantially identical fire insurance policies. Furthermore, a key factor in the *Dowd* decision was that:

> "... should one defendant be liable on the loss, all would be each in its pro rata share." (303 F. 2d 61)

The exact opposite is true in the instant case on both points. The contracts of the various defendants were not substantially identical and did not purport to render the same performance. If Thermal was held liable on the claim alleged against it, this would have no bearing whatever upon the liability of the other defendants such as Stephens-Adamson.

The statement by petitioner that the only predicate for the majority opinion was that each claim was under a separate purchase order or subcontract independently negotiated is totally inaccurate and misleading. The Court emphasized that each of the defendants was charged with making a separate and independent contract but that only one, Braun, agreed to design, engineer, construct and equip the plant. The separate and independent contracts were for different services of a highly specialized and individual nature, entered into on different dates and at different places, and promising performance at different times and at different places.

There were individual breaches of the individual contracts alleged to have occurred at separate places and at different times. Each alleged breach was predicated upon specific individual acts and gave rise to a single

wrong and a single claim for damages distinct from the breach by the other defendants. The liability of each defendant other than Braun was separate and distinct. As the Court of Appeals explained:

> "With the exception of Braun, no defendant assumed responsibility for other than its own unit, or was liable in any way for the failure of the others. We think it clear that there was more than one primary right, and that more than a single wrong was alleged. Absent Braun as a defendant, it is inconceivable that plaintiff could, simply because all units were to be installed in one plant, say that the separate claims against the several defendants were single and interdependent." (Petition, App. B, p. 9a)

The addition of Braun as some sort of attempted common denominator does not change the separate and independent nature of the claims. The complaint urges that Braun is jointly liable with each of the other defendants for their individual breaches of their individual contracts. Braun alone, however, is alleged to be liable for damages arising from the inoperable condition of the plant as a result of its defective design and engineering. The claim or cause of action against Braun and Thermal alleging joint liability for a part of the damage is separate and independent from each claim against Braun and the other defendants. Each of these claims is separate and independent from the claim against Braun alone.

The decision of the Court of Appeals is also consistent with its decision in *Greenshields* v. *Warner Pet. Corp.*, 248 F. 2d 61 (10th Cir. 1957), cert. den. 355 U.S. 909, which is not cited by petitioner. There the plaintiff sues numerous lessees and several plant opera-

tors who purchased gas from the lessees, alleging that his interest in an oil and gas field had been damaged by the contracts entered into by the defendants. The Court noted that the alleged wrongful acts of one of the plant operators occurred at a different time than those of the other defendants and consummated in a different result. Although all of the damages were to the plaintiff's interest in an oil and gas field, the Court held that the claim against the plant operator:

> ". . . arises from subsequent and different acts occasioning different results. It is a 'separate and independent claim' within the bounds of Section 1441(c) and as such permits removal to federal jurisdiction." (248 F. 2d 66)

The decision below does not conflict with any prior decision of the Tenth Circuit Court of Appeals or with the decisions of any other Court of Appeals and the petition should therefore be denied.

IV.

CONSTRUING 28 U.S.C., SECTION 1441(c) TO PERMIT REMOVAL OF SEPARATE AND INDEPENDENT CAUSES OF ACTION IN THE ABSENCE OF COMPLETE DIVERSITY OF CITIZENSHIP IS CLEARLY CONSTITUTIONAL.

The presumption of constitutionality which surrounds all legislation is, in this instance, strengthened by nearly a century of usage and judicial decision upholding the jurisdiction of Federal Courts to retain all aspects of a controversy between citizens of different states, including those aspects in which complete diversity does not exist. *Gaines* v. *Fuentes,* 92 U.S. 10 (1875); *Texas Employer's Ins. Ass'n.* v. *Felt,* 150 F. 2d 227 (5th Cir. 1945); *Kithcart* v. *Metropolitan Life Ins. Co.,* 150 F. 2d 997 (8th Cir. 1945), cert. den. 326 U.S. 777. Although these decisions dealt with the pred-

ecessors of Section 1441(c), the long history of permitting removal in diversity cases where there is less than complete diversity supports the constitutionality of the present statute.

The petitioner's first premise is that Article III, Section 2 of the United States Constitution requires complete diversity of citizenship between all plaintiffs and all defendants. However, complete diversity of citizenship is simply a statutory and not a constitutional limitation. *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965). The requirement of complete diversity delineated in *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806), was merely a construction of the Judiciary Act of 1789 and not a construction of Article III, Section 2.

The Federal Courts have refused to require complete diversity in various other contexts. The jurisdictional requirements of the Federal Interpleader Act, 28 U.S.C., Sections 1335, 1397, 2361, have been held to be satisfied by "minimal diversity", i.e., by diverse citizenship of any two adverse claimants. *Haynes* v. *Felder,* 239 F. 2d 868 (5th Cir. 1957); *Pan American Fire & Cas. Co.* v. *Revere,* 188 F. Supp. 474 (E.D. La. 1960); Chafee, "Federal Interpleader Since the Act of 1936," 49 Yale L.J. 377 (1940). Complete diversity has neither been required in class actions, *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921), nor in intervention suits by co-citizens. *Wichita R.R. & Light Co.* v. *Public Util. Comm.,* 260 U.S. 48 (1922); *Phelps* v. *Oaks,* 117 U.S. 236 (1886). Also, the American Law Institute's proposals for federal adjudication of a broad range of multi-party litigation are predicated upon the constitutional validity of "minimal" diversity. A.L.I., Study of the Division of Jurisdiction

Between State and Federal Courts, Sections 2341-2346, and commentary at 119-159 (Tentative Draft No. 2, 1964).

The precise constitutional attack made by the petitioner in this case has been expressly rejected in *Twentieth Century Fox Film Corp.* v. *Taylor,* 239 F. Supp. 913 (S.D. N.Y. 1965). See also *Baltimore Gas & Elec. Co.* v. *United States Fid. & Guar. Co.,* 159 F. Supp. 738 (D. Md. 1958); and *Breslerman* v. *American Liberty Ins. Co.,* 169 F. Supp. 531 (E.D. N.Y. 1959). Moreover, this Court, in its first and only construction of Section 1441(c), noted in *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6 (1951), that the revisers carefully provided "an opportunity" for state courts to adjudicate non-federal causes of action, implying that such claims may be federally retained.

Petitioner has relied heavily upon the opinion of certain commentators that Section 1441(c) is of doubtful constitutionality, but actually most commentators have concluded that retention of non-federal claims under Section 1441(c) violates no constitutional limitation. Moore and Van Dercreek, "Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim under Section 1441(c)", 46 Iowa L. Rev. 489 (1961); Cohen, "Problems in the Removal of a 'Separate and Independent Claim or Cause of Action,'" 46 Minn. L. Rev. 1 (1961); Green, "Jurisdiction of U.S. District Courts in Multiple Claim Cases," 7 Vand. L. Rev. 472 (1954).

In summary, nothing in Article III of the Constitution prohibits Congress from opening the Federal Courts to non-federal claims, so long as any two adverse parties are of diverse citizenship. Section 1441

(c) simply represents one instance in which the Congress has made use of the full grant of power contained in Article III, Section 2.

Even if constitutional support for Section 1441(c) could not be found in Article III, Section 2, its validity may nevertheless be upheld under the "necessary and proper" clause of Article I, Section 8, of the Constitution. Congress has long been concerned that removal jurisdiction might result in the fragmentation of litigation resulting in totally unnecessary delay, inconvenience and expense. In *Barney* v. *Latham,* 103 U.S. 205 (1881), the Supreme Court recognized the validity of this policy and allowed the removal of a separable controversy to operate to transfer the entire suit to the Federal Court. While Congress limited the category of removable claims in 1948 and required of them a greater degree of disassociation, it still retained the policy of avoiding fragmentation of litigation.

Indeed, removal itself is a creature of the Congressional power to make all laws necessary and proper for carrying into execution all powers vested by the Constitution.

The need for Section 1441(c), which Congress recognized, is well illustrated by the instant case, where complete diversity between the corporate plaintiff and the nine widely scattered corporate defendants would exist except for the fact that Thermal, although having its principal place of business in Pennsylvania, had been incorporated in Delaware, as had plaintiff.

Furthermore, the constitutionality of Section 1441 (c) can be validly premised upon the doctrines of pendant and ancillary jurisdiction, under which Federal Courts adjudicate many types of claims for which

there is no independent jurisdictional basis rooted in Article III. Petitioner apparently contends that the necessary and proper clause and pendant and ancillary jurisdiction cannot save the constitutionality of Section 1441(c), because they are both based upon a close relationship between the federal claim and the non-federal claim, while Section 1441(c) requires that the claims be "entirely unrelated". Petitioner thus seriously misconstrues Section 1441(c).

The test laid down by this Court in *Finn* as to the determination of a separate and independent cause of action was whether or not there was a single wrong arising from an interlocked series of transactions. The emphasis was obviously placed upon the "single wrong" and the test has thus been applied by every court dealing with a construction of Section 1441(c). It is clear that Section 1441(c) would apply to allow removal if more than a single wrong were alleged, even if the multiple wrongs arose from an interlocked series of transactions. Such claims would certainly not be "entirely unrelated" but would fall within the contemplation and application of Section 1441(c).

The only other possible basis for petitioner's contention is the addition of the word "independent" to the statutory limitation of the types of claims that are removable under Section 1441(c). However, a simple analysis of the meaning of such word clearly reveals that its addition does not mean that the "separate and independent" claim must be "entirely unrelated" to the other claims. In *Snow* v. *Powell*, 189 F. 2d 172, 174 (10th Cir. 1951), the Court noted:

> "The word 'independent' means not resting on something else for support; self-sustaining, not contingent or conditioned."

Furthermore, the courts have recognized that simply because there will be questions of law and fact common to all of the claims and such claims arise out of the same or similar occurrences does not mean that such claims are not "separate and independent" within the meaning of Section 1441(c). *Scheideler* v. *Jones,* 105 F. Supp. 726 (S.D. N.Y. 1952); *Orn* v. *Universal Automobile Ass'n. of Indiana,* 198 F. Supp. 377 (E.D. Wisc. 1961); *Reynolds* v. *Bryant,* 107 F. Supp. 704 (S.D. N.Y. 1952). Indeed, after the *Finn* case had been remanded by the Supreme Court to the Fifth Circuit Court of Appeals, it was there recognized that "separate and independent" does not mean "entirely unrelated" as it was pointed out that non-federal claims relating to the same transaction or series of transactions could be retained for federal adjudication. *Finn* v. *American Fire & Cas. Co.,* 207 F. 2d 113 (5th Cir. 1953), cert. den. 347 U.S. 912 (1954).

Petitioner seemingly urges that whenever multiple parties are properly joined under Rule 20 of the Federal Rules of Civil Procedure, there can never be any separate and independent claims. It thus attempts to use Rule 20 to affect and limit the removal jurisdiction of the federal courts, although such argument was rejected by *Texas Employers Ins. Ass'n.* v. *Felt,* 150 F. 2d 227 (5th Cir. 1945), and by the draftsmen of the Federal Rules who provided in Rule 82 that:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

This contention was fully considered and ably rejected by Professor Moore in Volume 1A of *Moore's Federal Practice,* 2d Ed. Section 0.163 (4.-5) at p. 708.

Finally, we point out that the constitutionality of Section 1441(c) was not raised in either the District Court or the Tenth Circuit Court of Appeals and was not considered or passed upon by either court. In such circumstances, it has been held that the constitutional question cannot be raised for the first time before the United States Supreme Court either on certiorari or appeal. *Abel* v. *U. S.*, 362 U.S. 217 (1960); *Ullmann* v. *U. S.*, 350 U.S. 422 (1956); *Federal Trade Commission* v. *Travelers Health Ass'n.*, 362 U.S. 293 (1960); *Duignan* v. *U. S.*, 274 U.S. 195 (1927); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

In *Evangelical Lutheran Church* v. *Stanolind Oil & Gas Co.*, 251 F. 2d 412 (8th Cir. 1958), the plaintiff raised the question of the constitutionality of Section 1441(c) for the first time in the Court of Appeals. The Court disposed of the issue by pointing out that the question of constitutionality had never been raised in the pleadings in the lower court, at the time of the motion to remand, or at the time of trial. The Court of Appeals then held that the issue was not properly before it because of lack of timeliness.

Regardless of whether the question can be raised, however, it is apparent that the constitutional question was not litigated below, and we submit that this case does not provide the proper procedural framework for the disposition of such a fundamental issue by this Court.

V.

WHETHER THE REMOVAL BOND OF A SINGLE DEFENDANT CAN EFFECT REMOVAL FOR MULTIPLE CO-DEFENDANTS IS NOT SUCH A QUESTION AS SHOULD BE DECIDED BY THE UNITED STATES SUPREME COURT AND, FURTHERMORE, THE DECISION BELOW ON SUCH POINT WAS ENTIRELY CORRECT.

Petitioner makes the flat statement that this is an important question of federal law which should be decided by the United States Supreme Court, but has totally failed to give any "special and important reasons" which would bring this question within the guidelines discussed in *Rice* v. *Sioux City Memorial Park Cemetary,* 349 U.S. 70 (1955). The resolution of this problem by this Court might perhaps peculiarly benefit the litigants in this case but certainly does not involve the settlement of principles which are of importance to the public. There is no showing that this decision has any real or substantial consequences for multiple litigants in other situations and indeed no such showing can be made. This is a rather insignificant problem and one that does not have such far reaching consequences as to compel this Court to exercise its discretion to grant certiorari.

Moreover, the decision by the Court of Appeals for the 10th Circuit on this issue was clearly correct. Well within the twenty day removal period, the respondent Stephen-Adamson Co. filed a properly conditioned bond which it had executed as principal and which Western Surety Co. had executed as surety. (R. 25-26). Thereafter, also within the twenty day removal period, each of the remaining respondents filed a Joinder In Removal Proceedings whereby each agreed to be bound by the removal bond which had been filed. (R. 32-33) A Rider To Removal Bond was subsequently filed by

which all of the respondents agreed to be bound as principals by the bond, and by which the surety warranted that the removal bond had been in continuous force and effect from and after the execution date of the bond and that it had been at all times and remained liable to the full extent of the terms, conditions and obligations of the bond. (R. 36)

The clear purpose of Section 1446(d) is to afford the petitioner a remedy to recover his costs if it should be determined that the case was improperly removed. *Tucker* v. *Kerner,* 186 F. 2d 79 (7th Cir. 1950); *Chase* v. *Erhardt,* 193 F. 305 (Vt. 1912); *Nelson* v. *Peter Keiwitt Sons Company,* 130 F. Supp. 59 (N.J. 1955); *CIT Corporation* v. *Ambrose,* 36 F. Supp. 311 (E.D. S.C. 1940). This purpose was clearly satisfied by the bond of the respondent Stephens-Adamson and therefore the requirements of Section 1446(d) were fulfilled and the subsequent joinder in the bond by the remaining respondents was unnecessary.

Further, the only simple and effective means to adequately satisfy the requirements of the removal statute within the twenty day period when multiple defendants scattered throughout the country are involved is for one to file the petition and bond and the others to file their consents or joinders therein. This procedure has been specifically recognized in *Stangard Dickerson Corp.* v. *United Electric R & MW,* 33 F. Supp. 449 (N.J. 1940). See also 76 C.J.S. Removal of Causes, § 204 page 1063, and *Hunt* v. *Pearce,* 284 F. 321 (8th Cir. 1922). Cf. *Peter Holding Co.* v. *LeRoy Foods, Inc.,* 107 F. Supp. 56 (N.J. 1952) and *McMahan* v. *Fontenot,* 212 F. Supp. 812 (W.D. Ark. 1963).

There is nothing in the language of Section 1446(d) to prevent separate joinders being made to a bond

originally executed by only one defendant. Indeed, if the clear intention to be bound by the conditions expressed in Section 1446(d) appears, it is not even necessary that the bond be signed by the defendant. *Herbert* v. *Roxana Petroleum Corporation*, 12 F. 2d 81, (E.D. Ill. 1926); *Public Grain and Stock Exchange* v. *Western Union Telegraph Company*, 16 F. 289 (C.C. Ill. 1883); *Fayette Title and Trust Company* v. *Maryland P. & W. V. T. & T. Company*, 180 F. 928 (C.C. Pa. 1910).

Petitioner contends that only Stephens-Adamson was a principal on the bond and that the purported joinder of the other parties discharged the surety. It is clear, however, that the mere fact that the obligation of some person is added to that of the principal does not release the surety. 144 A.L.R. 1266, 1267. There was no change in the surety contract and the surety was not adversely affected.

Moreover, even if it should be concluded that the surety was adversely affected by the joinders, it cannot be said that the bond was void from that point on. At most it was voidable at the option of the surety and such alleged defect cannot be availed of by the petitioner. Finally, it must be remembered that the surety ratified and confirmed the bond. The law is clear that even though the removal period has expired, a defective removal bond can be validly ratified, *Gallahar* v. *Geo. A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943), or cured by amendment. *National Quicksilver Corp.* v. *World Insurance Co. of Omaha*, 139 F. 2d 1 (8th Cir. 1943); *Gray* v. *Oregon Shortline R. Co.*, 37 F. 2d 591 (S.D. Idaho 1930); *CIT Corporation* v. *Ambrose*, 36 F. Supp. 311 (E.D. S.C. 1940); *Hodge* v. *Chicago & A. Ry. Co.*, 121 F. 48 (8th Cir. 1903); *Chase* v.

Erhardt, 198 F. 305 (Vt. 1912); *Dennis* v. *Alachua County,* 3 Woods 683, 7 Fed. Cas. p. 467, No. 3791 (C.C. Fla. 1877). The authorities also agree that a defect in a removal bond is merely a procedural and not a jurisdictional defect. *Tucker* v. *Kerner,* 186 F. 2d 79 (7th Cir. 1950); *James Rivers Apartments* v. *Federal Housing Administration,* 136 F. Supp. 24 (Md. 1955); *Covington* v. *Indemnity Insurance Co.,* 251 F. 2d 930 (5th Cir. 1958); 1A *Moore's Federal Practice* § 0.168 (3.-7), p. 1286.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

J. R. Modrall
Daniel A. Sisk
Kenneth L. Harrigan
P. O. Box 466
Albuquerque, New Mexico
Attorneys for Respondent
C. F. Braun and Company

James C. Ritchie
Duane C. Gilkey
P. O. Box 1828
Albuquerque, New Mexico
Attorneys for Respondent
Pennsalt Chemical Corporation

John B. Tittman
Russell Moore
First National Bank Bldg., W.
Albuquerque, New Mexico
Attorneys for Respondents
J. T. Thorpe, Inc., and
Beaumont Birch Company

DAVID G. HOUSEMAN
3624 Menaul Blvd. N. E.
Albuquerque, New Mexico
Attorney for Respondent
Heyward-Robinson Company

DAVID A. GRAMMER
Bank of New Mexico Building
Albuquerque, New Mexico
Attorney for Respondent
Thermal Research and
Engineering Corporation

RICHARD B. ADDIS
P. O. Box 1457
Albuquerque, New Mexico
Attorney for Respondent
Stephens-Adamson Mfg. Co.

WILLARD F. KITTS
P. O. Box 487
Albuquerque, New Mexico
Attorney for Respondent
Standard Steel Corporation